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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SERGIO GARCIA CASTELLANOS, Defendant and Appellant.	H042594 (Monterey County Super. Ct. No. SS150480A)

Defendant Sergio Garcia Castellanos pleaded no contest to burglary of an inhabited dwelling (Pen. Code, § 459). Pursuant to the plea agreement, the trial court suspended imposition of sentence and placed defendant on probation for three years. On appeal, defendant contends that three of the probation conditions are not reasonably related to the offense or future criminality. He also contends that the conditions are unconstitutionally vague and overbroad. We affirm.

I. Statement of Facts

The plea agreement, which was signed by defendant, states: "On December 29, 2014, in the County of Monterey, defendant entered an inhabited home with the intent to commit larceny."

II. Discussion

Defendant challenges imposition of three probation conditions, which provide in relevant part: "9. Not knowingly use or possess alcohol, intoxicants, or other controlled substances without the prescription of a physician . . . . [¶] 10. Submit to and complete any field sobriety test or alcohol/narcotics testing of your blood, breath, or urine at the request of any probation officer or peace officer. [¶] . . . [¶] 19. Participate in any counseling or substance abuse program the probation officer deems necessary, including approved residential treatment."

Defendant argues that these conditions are not reasonably related to the offense of which he was convicted or reasonably related to future criminality. However, defendant has forfeited this claim by failing to raise it before the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237 (*Welch*).) Defendant argues, however, that if his claim was forfeited, he was deprived of the effective assistance of counsel. We disagree.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "'In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.] If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there

simply could be no satisfactory explanation." [Citations.]'" (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).)

A trial court has broad discretion to impose such reasonable probation conditions "as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (Pen. Code, § 1203.1, subd. (j).) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486, superseded on another ground as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292.) "The [*Lent*] test is clearly in the conjunctive, that is, the three factors must all be found to be present in order to invalidate a condition of probation." (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65, fn. 3.)

The present case was one of two residential burglary cases to which defendant entered a plea of no contest in exchange for a grant of probation.[1] The other case was case No. SS143169A. Defendant was represented by separate counsel in each case. At the sentencing hearing, the trial court first granted probation in case No. SS143169A and then granted probation in the present case. The trial court imposed the same probation conditions in both cases.[2]

Defendant cannot show deficient performance. The same conditions had been imposed in case No. SS143169A. Thus, trial counsel could have reasonably decided not to object to the conditions, since they would not further burden or restrict defendant. The record before us also suggests a link between substance abuse and defendant's criminal conduct. The trial court imposed a probation condition prohibiting defendant from using

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[1] According to trial counsel at the sentencing hearing, both cases arose from defendant's conduct within half an hour on the same day.

[2] Defendant has not filed a notice of appeal in case No. SS143169A.

or possessing marijuana without a recommendation from a healthcare provider, who was "aware [defendant had] a history of substance abuse and the healthcare provider still recommend[ed] the use of marijuana."[3] Defendant has not challenged this condition. In addition, the probation report in the present case does not provide a full social history for defendant. The probation report states in relevant part: "A pre-sentence report in Case #SS143169A was completed March 31, 2015, and contains [defendant's] social history. However, the following information has been updated: . . . With regards to the use of controlled substances, [defendant] admitted he smoked marijuana approximately three times while incarcerated in the Monterey County Jail pending sentencing in Case #SS143169A. He denied the use of alcohol or any other controlled substances since his release from the jail on June 10, 2015." Defendant's use of marijuana even while he was in custody suggests that he has a substance abuse problem. There may also have been additional information in the probation report for case No. SS143169A establishing a link between defendant's substance abuse and his criminal conduct. Accordingly, trial counsel could have reasonably determined that any objection would have failed and counsel's performance does not fall below prevailing professional norms when he or she fails to make an objection without merit. (*People v. Lewis* (1990) 50 Cal.3d 262, 289.)

Defendant argues that there is no evidence that trial counsel was aware that the same probation conditions were imposed in case No. SS143169A[4] or that trial counsel had any knowledge of a link between substance abuse and the first degree burglary in case No. SS143169A. However, "'an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." [Citations.]'" (*Lopez*,

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[3] The trial court also imposed this probation condition in case No. SS143169A.

[4] In case No. SS143169A, the trial court stated the specific terms of condition Nos. 9 and 10 on the record and referred to the condition relating to substance abuse treatment by its number while trial counsel in the instant case was present.

supra, 42 Cal.4th at p. 966.) Here, defendant has failed to establish that there was no satisfactory explanation for trial counsel's failure to object to these conditions.[5]

Defendant next contends that condition Nos. 9 ("[n]ot knowingly use or possess alcohol, intoxicants, or other controlled substances without the prescription of a physician") and 10 ("[s]ubmit to and complete any field sobriety test or alcohol/narcotics testing") are unconstitutionally vague and overbroad.

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions. [Citation.]' [Citation.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*Ibid.*)

The overbreadth doctrine focuses on other, though related, concerns. "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Under this doctrine, "'"a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."' [Citations.]" (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.) "'A law's overbreadth represents the

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[5] To the extent that the record is unclear on trial counsel's tactical decision, defendant's "claim of ineffective assistance is more appropriately made in a habeas corpus proceeding, in which the attorney has the opportunity to explain the reasons for his or her conduct." (*People v. Wilson* (1992) 3 Cal.4th 926, 936.)

failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.' [Citation.]" (*Ibid.*)

The *Welch* forfeiture rule applies to a challenge to a probation condition unless it is a facial constitutional challenge. (*Sheena K., supra*, 40 Cal.4th at pp. 881-882, 886-887.) Only a facial challenge "that is 'correctable without referring to factual findings in the record or remanding for further findings' is not subject to forfeiture." (*Id.* at p. 887.)

Defendant argues that the terms "intoxicants" and "narcotics" are not adequately defined and thus unconstitutionally vague. He notes that intoxicants could include legal substances, such as glue and gasoline. He also claims that intoxicants and narcotics could include "drugs that can be purchased over the counter without a prescription such as . . . cold medicine, sleep aids, appetite suppressants, or other legally sold items with intoxicating side effects, such as energy drinks[,] diuretics, motion sickness pills, or mouthwash." He further argues that the probation conditions are overbroad, because they prohibit him from engaging in legal conduct by using or possessing legal intoxicants or narcotics.

In *People v. Rodriguez* (2013) 222 Cal.App.4th 578, the defendant challenged as unconstitutionally vague and overbroad a probation condition that she "'[n]ot use or possess alcohol, intoxicants, narcotics, or other controlled substances without the prescription of a physician . . . .'" (*Id.* at p. 592.) This court concluded that "a scienter element is reasonably implicit in this condition" with respect to controlled substances. (*Id.* at p. 593.) However, this court also recognized that the probation condition was not limited to substances regulated by statute. (*Id.* at p. 594) Noting that "'intoxicants' . . . is susceptible of different interpretations, which may include common items such as adhesives, bath salts, mouthwash, and over-the-counter medicines," this court concluded

that "the addition of an express knowledge requirement will eliminate any potential for vagueness or overbreadth in applying the condition." (*Id* at p. 594, fn. omitted.) Thus, this court ordered that the condition be modified to add an express knowledge requirement to "eliminate any potential for vagueness or overbreadth in applying the condition." (*Id*. at p. 594.) Here, the challenged probation conditions include an express knowledge requirement.

In addition, defendant's concern that he will have violated probation based on innocent activities is unwarranted. The language of a condition must be read in context of the situation and is not vague or overbroad "'if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources.'" (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117.) Here, the condition places "intoxicants" together with "other controlled substances." When reasonably and practically construed, the condition limits the use and possession of illegal intoxicants.

Defendant next argues that the narcotics for which he must submit to testing in condition No. 10 is unconstitutionally vague. Defendant acknowledges that Health and Safety Code section 11019 defines the term "narcotic drug,"[6] but he argues that "only

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[6] Health and Safety Code section 11019 provides: "'Narcotic drug' means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: [¶] (a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate. [¶] (b) Any salt, compound, isomer, or derivative, whether natural or synthetic, of the substances referred to in subdivision (a), but not including the isoquinoline alkaloids of opium. [¶] (c) Opium poppy and poppy straw. [¶] (d) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, but including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine. [¶] (e) Cocaine, whether natural or synthetic, or any salt, isomer, derivative, or preparation thereof. [¶] (f) Ecgonine, whether natural or synthetic, or any salt, isomer, derivative, or preparation thereof. [¶] Acetylfentanyl, the thiphene analog thereof, derivatives of either, and any salt, compound, isomer, or preparation of acetylfentanyl or the thiophene analog thereof."

criminal lawyers and criminal judges are aware that the Health and Safety Code includes a definition of 'narcotic drug,' that the term 'narcotics' refers to a 'narcotic drug,' or where to look for such a definition." There is no merit to defendant's argument. "'"It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof."' [Citation.]" (*Stark v. Superior Court* (2011) 52 Cal.4th 368, 396.)

In his opening brief, defendant contends that condition Nos. 10 and 19, which require drug and alcohol testing and participation in substance abuse treatment, impinge on his constitutional rights and must be modified. He asserts that "the facts of this case demonstrate that the probation conditions are not rationally related to rehabilitation or public safety. Simply put, [defendant] has no history of alcohol or drug abuse, nor does he in any way present a danger to the public for those, or any other reasons." Following this court's request for supplemental briefing, defendant agrees with the Attorney General that this claim is not capable of resolution without reference to the record before the trial court. Thus, defendant argues that his trial counsel rendered ineffective assistance. As previously discussed, trial counsel may have had a satisfactory explanation for failing to object to conditions relating to defendant's use of alcohol and/or drugs. Accordingly, we reject defendant's argument.

III. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.

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